

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

|                                     |   |                             |
|-------------------------------------|---|-----------------------------|
| <b>ANGELA COBB</b>                  | ) |                             |
| Claimant                            | ) |                             |
| VS.                                 | ) |                             |
|                                     | ) |                             |
| <b>FAB-PRO ORIENTED POLYMERS</b>    | ) |                             |
| Respondent                          | ) | Docket No. <b>1,053,786</b> |
|                                     | ) |                             |
| AND                                 | ) |                             |
|                                     | ) |                             |
| <b>TWIN CITY FIRE INSURANCE CO.</b> | ) |                             |
| Insurance Carrier                   | ) |                             |

**ORDER**

Respondent and its insurance carrier request review of the April 6, 2012, Award entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Workers Compensation Board heard oral argument on July 20, 2012, in Wichita, Kansas.

**APPEARANCES**

Phillip B. Slape of Wichita, Kansas, appeared for claimant. Timothy A. Emerson of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award.

**ISSUES**

The ALJ found claimant sustained a 6.5% whole body functional impairment due to burn injuries she sustained on January 6, 2010. In arriving at that conclusion, the ALJ gave equal weight to the ratings of both testifying physicians -- treating physician Dr. Mark Dobyns, who opined claimant sustained no permanent impairment, and Dr. Pedro Murati, who opined claimant sustained a 13% whole body functional impairment.

The ALJ awarded permanent partial disability benefits (PPD) based on a 51% work disability, consisting of an average of a 100% wage loss and a 2.5% task loss. The 2.5%

task loss represented an average of the task loss opinions of Drs. Dobyms (no task loss) and Murati (5% task loss).

Respondent contends the evidence supports findings that claimant sustained no permanent injury, no task loss, no permanent impairment of function, and that claimant is not entitled to a work disability award. Respondent requests the Board reverse ALJ Barnes' Award.

Claimant contends she sustained a 13% whole body functional impairment and a work disability of 52.5%, which is based on a 100% wage loss and a 5% task loss.

The sole issue before the Board is the nature and extent of claimant's disability, including both functional impairment and work disability.

#### **FINDINGS OF FACT & CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds:

At the time of the regular hearing, claimant was 27 years old. She had worked for respondent since November 2004. At the time of her accident claimant was an extrusion operator, a job she had performed for respondent for three years. The machine claimant operated involved the melting of small pellets into liquid form. The machine then ran the melted material through various other processes, resulting in the production of baling twine and concrete fibers.

Claimant described her January 6, 2010, accident as follows:

I was standing next to a machine that was down, and there were two separate areas, there is the control machine and there was another gentleman standing there, and I was standing back where the product would start coming out of the machine, and when he hit the start button, the machine malfunctioned, it was a mechanical malfunction, and the plastic instead of going through the machine like it was supposed to, diverted and came out and shot out towards me and landed in my -- it landed right on my forehead.<sup>1</sup>

The 400-degree melted plastic landed on the top of claimant's head and then dripped down on her forehead, nose, and chin. Claimant sought medical treatment at the emergency room of Kingman County Hospital the following day. At the hospital the burn injuries were rinsed with saline solution and small pieces of plastic were extracted from the

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<sup>1</sup> R.H. Trans. at 8-9.

wounds with tweezers. Claimant was provided with a tube of triple antibiotic cream to apply to the affected areas. On January 11, 2010, claimant attended an appointment with Dr. Jeremy Tamir, a plastic surgeon. The records of Kingman County Hospital and Dr. Tamir are not in evidence.

After claimant saw Dr. Tamir, her treatment was transferred by respondent to Dr. Mark Dobyns, who practices occupational medicine. Claimant's initial office visit with Dr. Dobyns was on January 14, 2010. The doctor diagnosed first degree burns to claimant's chin and nose, and first and second degree burns to her forehead. Dr. Dobyns recommended claimant apply vitamin E lotion to the areas burned in the accident. At his second and final office visit with claimant on March 5, 2010, Dr. Dobyns concluded claimant's burns had completely healed. He placed no permanent restrictions on claimant's physical activities and released her from treatment.

Claimant testified that she continued to experience problems following her release from treatment. Specifically, she had dryness, flakiness, and chapping of the skin on her forehead, especially in the wintertime. At times she applied Vitamin E lotion and Vaseline. Claimant avoided being out in the sun and perspiring because those conditions irritated the scarring on her forehead and caused a rash to develop. Claimant had to pull her hair back away from her forehead to keep the oil from her hair from causing a rash. Wearing makeup at times irritated the skin as well. Claimant had visible scarring and lighter skin pigmentation on her forehead.<sup>2</sup> She testified she experienced some loss of sensation in the middle of the scar.

Claimant continued to work for respondent until September 6 or September 7, 2010, when she quit. Claimant testified that working around hot ovens and dyes irritated her scar, causing claimant to frequently clean her forehead with a wet paper towel in order to avoid developing a rash. She had not worked since she quit her job with respondent.

At his deposition, Dr. Dobyns opined that claimant did not suffer any physical impairment affecting her ability to work and that she did not sustain any injury to the trigeminal nerve. Dr. Dobyns reviewed the list of claimant's former work tasks prepared by vocational consultant Doug Lindahl and concluded claimant could perform all of the 39 tasks for a 0% task loss. The doctor opined that because claimant's injury was a burn to the skin it would not affect her motor skills or ability to function.

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<sup>2</sup> At the regular hearing, two photographs of claimant, taken by her counsel the same day, were admitted into evidence. The photos reveal the area of scarring and a difference in skin color on the middle of claimant's forehead, beginning above her nose and extending upward to just below claimant's hair line. The size of the scar appears to be the size described in the notes of Dr. Dobyns, three centimeters long and approximately eight millimeters in width at its widest point.

Dr. Dobyns testified:

Q. Do you know what section of the AMA Guides you would utilize in evaluating a permanent impairment for a burn?

A. I do not off the top of my head know, no.

Q. Okay. Did you review the AMA Guides in this case before you arrived at your opinion that there was no permanent impairment?

A. No.<sup>3</sup>

Although Dr. Dobyns concluded that claimant's injuries could not possibly have caused injury to the trigeminal nerve,<sup>4</sup> he did not check for loss of sensation at the situs of claimant's scar.<sup>5</sup>

Dr. Pedro Murati examined claimant on January 24, 2011, at the request of claimant's attorney. The doctor reviewed claimant's medical records, took a history, and performed a physical examination. Dr. Murati diagnosed: 1) neuropathy of the trigeminal nerve and 2) skin disorder secondary to burn. He found a loss of sensation in the scarred area of claimant's forehead. The doctor opined that claimant's current diagnoses are a direct result of her work-related injury of January 6, 2010. In his narrative report, Dr. Murati expressed the opinion that claimant should work as tolerated and use common sense. At his deposition, Dr. Murati testified claimant should avoid working in the sun and avoid exposure to irritants to the skin.

Based upon the AMA *Guides*<sup>6</sup>, Dr. Murati concluded claimant sustained a 10% whole person functional impairment due to her skin disorder and a 3% whole person impairment for the trigeminal neuropathy. These impairments combine to a 13% whole person functional impairment.

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<sup>3</sup> Dobyns Depo. at 15.

<sup>4</sup> The trigeminal nerve is one of the five cranial nerves. It innervates various parts of the head and face, including the forehead. Murati Depo. at 18.

<sup>5</sup> *Id.* at 8, 13, 14.

<sup>6</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

Dr. Murati reviewed the list of claimant's former work tasks prepared by Doug Lindahl and concluded claimant could no longer perform 2 of the 39 tasks for a 5% task loss.

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The Act recognizes two different classes of permanent injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body part or a permanent general bodily disability.<sup>7</sup>

There is no dispute that claimant's injury was not a scheduled injury under K.S.A. 44-510d. Accordingly, claimant's entitlement to PPD is governed by K.S.A. 44-510e(a) which states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of

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<sup>7</sup> K.S.A. 44-510d; K.S.A. 44-510e.

the average gross weekly wage that the employee was earning at the time of the injury.

Under K.S.A. 44-510e(a), PPD may be calculated in two ways: (1) based on a statutorily defined work disability or (2) based on an overall functional impairment. Claimant is entitled to the greater of the two.<sup>8</sup>

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>9</sup> It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of claimant and any other testimony relevant to the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.<sup>10</sup>

The Board finds that Dr. Murati's impairment rating is the only opinion in the record based on the fourth edition of the *AMA Guides*. The Board accordingly finds claimant sustained a 13% permanent functional impairment and is entitled to PPD therefor during the period from the date of accident through claimant's last day of work for respondent. The Board finds that Dr. Murati's opinion regarding functional impairment is credible because his rating was established by competent medical evidence and based on the *AMA Guides*, whereas the opinion of Dr. Dobyns was not based on the *AMA Guides*. Moreover, Dr. Murati's opinion regarding claimant's nerve injury is entitled to greater weight and credibility than Dr. Dobyns' opinion because Dr. Murati's opinion was based on a sensory pinprick examination of the scarring which showed claimant was hypoesthetic in the entire area of the scar. Dr. Dobyns did no such testing.

Since claimant stopped working for respondent she has not engaged in any work earning 90% or more of her pre-injury average weekly wage. Hence, claimant is entitled to PPD for the higher of her functional impairment of 13% to the whole body or based on the extent of her work disability, if any.

Functional impairment under K.S.A. 44-510e(a) is the percentage of the loss of a portion of the human body's total physiological capabilities. The scarring sustained by claimant would not seem to have resulted in claimant losing much, if any, physiological capabilities. Nonetheless, the Board finds the evidentiary record supports that claimant sustained a rateable 13% functional impairment under the *AMA Guides*.

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<sup>8</sup> *Stephen v. Phillips County*, 38 Kan. App. 2d 988, 174 P.3d 452, rev. denied 286 Kan. 1186 (2008).

<sup>9</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

<sup>10</sup> *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

Dr. Murati utilized the AMA *Guides* to assign an impairment rating. His 13% rating for a discoloration and loss of sensation in a small area to claimant's forehead appears excessive. Nevertheless, even if Dr. Murati's 3% rating for trigeminal neuropathy is wholly discounted, he still provided an expert opinion supporting a 10% rating under the AMA *Guides* for claimant's skin disorder.

Dr. Murati consulted the AMA *Guides*, as required by law; Dr. Dobyns did not and did not know where to look in the AMA *Guides* to assess impairment for burns and scars. Dr. Dobyns could have demonstrated why claimant's injury did not warrant an impairment by citing the AMA *Guides*, but simply did not follow the law and did not adequately explain why claimant had no impairment.

The Board concludes that claimant does not have any task loss. She candidly acknowledged that Dr. Murati's written restrictions of work as tolerated and use common sense would not preclude her from performing any of the tasks she performed in the 15 years prior to her accidental injury.<sup>11</sup> Her own testimony is that she had no task loss except that working around grease at Sonic “*could*” be an irritant and that working at Casey's “around flour and the ovens and the sweating and the flour *could* be an irritant on [the scar] as well”<sup>12</sup> (emphasis added). Dr. Murati's indications that claimant should not wash dishes at Casey's or prepare food at Sonic were based on his assumption that grease or cleaning solvents might get on claimant's scar.<sup>13</sup> This task loss opinion is not based on the standard of more probable than not or to a reasonable degree of medical probability. Furthermore, it is not based on restrictions Dr. Murati actually suggested in his report, but is rather based on claimant's concern that work at Sonic or Casey's *might* cause problems with her scar.<sup>14</sup> Dr. Murati disregarded his written restrictions and instead parroted claimant's testimony. It does not appear to the Board that Dr. Murati's assigned task loss is based on medical science as much as it is based on mimicking claimant's concerns that she could potentially have problems performing past tasks. The Board finds that Dr. Murati's “rubber-stamping” of claimant's theoretical concerns about potential problems does not rise to the more probably true than not true burden of proving task loss based upon a reasonable degree of medical probability.

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<sup>11</sup> R.H. Trans. at 36.

<sup>12</sup> *Id.* at 19-21.

<sup>13</sup> Murati Depo. at 8-9, Ex. 2 at 4.

<sup>14</sup> R.H. Trans. at 36.

As a final observation, this case does not fit nicely with *Hart*,<sup>15</sup> which was cited by respondent.<sup>16</sup> In that case, the Board found Mr. Hart failed to prove permanent impairment after four medical professionals expressed grave doubts about Mr. Hart having permanent injury based on surveillance, the absence of restrictions, no objective proof of injury and possible malingering. The Board denied work disability benefits because claimant had no permanent impairment. The Kansas Court of Appeals stated, "We agree with Bott that the language of K.S.A. 44-510e(a) necessarily precludes a finding that claimant is entitled to work disability under this circumstance."<sup>17</sup>

In this case, unlike *Hart*, there were no medical professionals questioning claimant's credibility. The Board finds that as of September 8, 2010, claimant is entitled to a 50% work disability based upon a 0% task loss and a 100% wage loss.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>18</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE**, the Board hereby modifies the April 6, 2012, Award entered by ALJ Barnes and finds claimant sustained a 13% permanent functional impairment followed by a 50% work disability as a result of her accidental injury of January 6, 2010.

Claimant is entitled to 34.86 weeks of permanent partial disability compensation at the rate of \$436.23 per week or \$15,206.98 for a 13% functional disability followed by 172.64 weeks of permanent partial disability compensation at the rate of \$436.23 per week or \$75,310.75 for a 50% work disability, making a total award of \$90,517.73.

As of October 30, 2012, there would be due and owing to the claimant 146.86 weeks of permanent partial disability compensation at the rate of \$436.23 per week in the sum of \$64,064.74 for a total due and owing of \$64,064.74, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount

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<sup>15</sup> *Hart v. Bott Family Farms*, No. 99,895, 2009 WL 1140274 (Kan. App. unpublished opinion filed April 24, 2009), *rev. denied* 290 Kan. 1093 (2010).

<sup>16</sup> Respondent's Reply Memorandum at 5 (filed June 21, 2012).

<sup>17</sup> *Hart*, *supra*.

<sup>18</sup> K.S.A. 2011 Supp. 44-555c(k).



of \$26,452.99 shall be paid at the rate of \$436.23 per week for 60.64 weeks or until further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October, 2012.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

**CONCURRING & DISSENTING OPINION**

The undersigned Board Members agree with the majority that claimant sustained no task loss, but disagree that she sustained a permanent functional impairment or permanent restrictions as a result of her January 6, 2010, work-related accident. K.S.A. 44-510e(a) states in part:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Dr. Murati's opinion that claimant sustained permanent impairment is not based upon competent medical evidence. He indicated claimant had second-degree burns that caused trigeminal neuropathy. Dr. Murati testified that second and third-degree burns have blisters. On the other hand, first-degree burns, which in Dr. Murati's words are like a sunburn, do not have blisters. He then stated that claimant had blisters. However, claimant testified she had no blisters. Therefore, Dr. Murati's opinion that claimant had second-degree burns deep enough to cause trigeminal neuropathy is premised on an

incorrect fact. That is important, because the deeper and the more severe the burn, the more likely it is to cause trigeminal neuropathy.

Dr. Dobyns testified that a burn is determined to be a first, second or third-degree burn based upon the depth of the burn. A first-degree burn is to the superficial layer of the skin; a second-degree burn is to the epidural layer of the skin which can cause blistering and sometimes scarring; and a third-degree burn extends to the layer that produces the skin. Dr. Dobyns correctly understood that claimant had no blisters when she suffered the burn, which indicated a first-degree or a mild second-degree burn. When he examined claimant, he found no evidence of nerve damage. He also noted that claimant had no symptoms of nerve damage. His testimony was that claimant sustained no injury that could possibly cause nerve damage.

The ALJ and the majority of the Board found that Dr. Dobyns did not base his functional impairment on the *AMA Guides*. The undersigned Board Members disagree as Dr. Dobyns opined claimant had no functional impairment. So certain was Dr. Dobyns that claimant had no permanent functional impairment, that Dr. Dobyns found it unnecessary to consult the *AMA Guides*. Because Dr. Dobyns opined claimant had no functional impairment, K.S.A. 44-510e(a) did not require him to specifically consult the *AMA Guides*.

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BOARD MEMBER

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